



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE AMERICAN LAW REGISTER.

MAY 1885.

VALIDITY OF CONTRACTS IN RESTRAINT OF TRADE.

(Concluded from April Number.)

V. CLASSIFICATION.—Chief Justice PARKER (*Mitchel v. Reynolds*, 1 P. Wms. 181), divides contracts in restraint of trade into two classes, namely: involuntary and voluntary; the former restraints arising from, first, grants or charters from the crown; second, customs; and third, by-laws; and the latter comprising those restraints which arise from the agreement of the parties. Only voluntary restraints will be treated in this article. Voluntary restraints are sub-divided into, first, general, and second, particular or limited restraints; which sub-division will be followed.

VI. GENERAL RESTRAINTS.

(a) *Criterion of Validity*.—It is exceedingly difficult to lay down a general rule to cover all classes of cases. Each contract must rest upon its own peculiar circumstances. The reasonableness of the limitation is the criterion of validity. Many cases have made the extent of territory covered by the prohibition the final and conclusive test. Yet this is not always infallible. If the extent of the restraint upon one party is not greater than the protection to the other party requires, the contract is reasonable and valid: *Roussillon v. Roussillon*, 14 Ch. Div. 351; s. c. 19 Am. Law Reg. 748. Thus, an agreement of a solicitor to relinquish the practice of his profession in London, or within one hundred and

fifty miles thereof (*Bunn v. Guy*, 4 East 190), or even if the prohibition extends throughout the whole kingdom (*Whittaker v. Howe*, 3 Beav. 383), is valid; while an agreement of a dentist to abstain from the practice of dentistry within a circuit of one hundred miles was held void: *Horner v. Graves*, 7 Bing. 735; s. c. 5 Moore & Payne 768.

(b) *Rule Stated*.—Subject to the exceptions which will hereafter appear, the general principle may be thus stated: All contracts in restraint of trade whose operation is general, are void. The application of the rule is more difficult than a clear understanding of it. Contracts to abstain from a business everywhere, or throughout the realm, and, usually, contracts whose prohibition covers an entire state, or a large part thereof, come within this principle.

(c) *Application of the Rule*.

(1.) *Restraints extending everywhere*.—A contract not to carry on a business anywhere is clearly unreasonable, for its operation is general. It can be of no benefit to either party. And if one agrees to abstain from a certain business at any place where the vendee might carry on the same business, the agreement is unenforceable. *Thomas v. Miles's Admrs.*, 3 Ohio St. 274 (1854); *Hedge v. Lowe*, 47 Iowa 137 (1877); *Gale v. Reed*, 8 East 80 (1806); *Mossop v. Mason*, 18 Gr. Ch. (Ont.) 453 (1871); *Kennedy v. Lee*, 3 Mer. 440, 451, 452 (1817); *Lange v. Werk*, 2 Ohio St. 519 (1853). So is an agreement to abstain from the business of brewing at P. or elsewhere: *Hinde v. Gray*, 1 M. & G. 195 (1840); s. c. 1 Scott (N. S.) 123; see *Curtiss v. Gokey*, 68 N. Y. 300 (1877); s. c. 5 Hun 555 (1875); *Bank v. King*, 44 N. Y. 87 (1870); *Peltz v. Eichele*, 62 Mo. 171 (1876); or coal merchant for nine months: *Ward v. Byrne*, 5 M. & G. 548, 562 (1839); 13 Jur. 1175; or a stipulation by one partner, on selling out his share, "to cease being in that trade;" *Maier v. Hoofman*, 4 Daly (N. Y.) 168 (1871); or a bond conditioned that the obligor shall never conduct or be engaged in the yeast powder business; *Callahan v. Donnolly*, 45 Cal. 152 (1872); or in the business of founding iron; *Alger v. Phacher*, 19 Pick. (Mass.) 51 (1837).

(2.) *Same. Throughout the Realm*.—It is evident that a contract not to pursue one's trade in the entire realm or country is void, because the country suffers the loss of being deprived of the restricted party's industry; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. *Oregon*

Steam Navigation Co. v. Winsor, 20 Wall. 68 (1873). Thus, a stipulation not to be connected either "directly or indirectly" in the manufacture of stearin candles for a specified time in any part of the United States is void: *Lange v. Werk*, 2 Ohio St. 519 (1853). So is an agreement between partners engaged in manufacturing daguerreotype materials, on dissolution, that one shall never engage in that business again in any part of the United States. *Dean v. Emerson*, 102 Mass. 480 (1869).

(3.) *Same. Throughout a State.*—It has been held that a bond not to engage in the business of asphaltum roofing and pavement-laying in the city or county of San Francisco, or state of California," is void: *Moore v. Bonnett*, 40 Cal. 251 (1870); or never to engage in the business of manufacturing and selling shoe-cutters at any place within the state of Massachusetts: *Taylor v. Blanchard*, 13 Allen 370 (1866); or to abstain from running a steamboat on any of the waters of California: *Wright v. Ryder*, 36 Cal. 357 (1868). These cases proceed upon the theory that if such contracts were upheld, the one bound would be compelled to transfer his residence and allegiance to another state in order to pursue his avocation. Judge SELDEN, of the New York Supreme Court, in answer to the contention that no restraint could be general which operated in a single state only, denounced it to be repugnant to "the general frame and policy of our government to regard the Union, in respect to our ordinary internal and domestic interests, as one consolidated nation. For all these purposes, each state is a separate community, with separate and independent public interests." *Lawrence v. Kidder*, 10 Barb. 641 (1851). "But this mode of applying the rule," says BRADLEY, J., (*Oregon Steam Navigation Co. v. Winsor*, *supra*,) "must be received with some caution. This country is substantially one country, especially in all matters of trade and business, and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular trade or business within a particular state. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New

York, where his associate is to reside and carry on business. Can any one doubt that such an agreement would be valid? *Stearns v. Barrett*, 1 Pick. (Mass.) 442 (1823). Contracts in sale of process of secret manufacture of articles which restrain the vendor from engaging in the manufacture of them are valid. Cases must be adjudged according to their circumstances, and can only be rightly judged when the reasons and grounds of the rule are carefully considered." Accordingly, upon the sale of a steamboat, a covenant not to run it on the waters of the state of California was sustained. *Oregon, &c., Co. v. Winsor*, *supra*.

Judge CHRISTIANCY's views on this question fully accord with those of the Supreme Court of the United States. And he sustained a bond given by a printer and publisher, whose business extended throughout the state of Michigan, stipulating never to carry on that business within that state. *Beal v. Chase*, *supra*. See remarks of this judge, *ante*. Upon principle, the latter view is undoubtedly the correct one. Contracts which embrace the entire state must be determined upon the same principle as those which contemplate a general restraint.

(4.) *Same. Throughout a large portion of a State or Country.*—The same reasons which have been given for declaring contracts in general restraint of trade void, apply with equal force to those which seek to deprive a large portion of a state or country of the restricted party's labor. The same evils follow in both cases. Thus, a stipulation of a dentist not to practise dentistry within a circuit of 200 miles in diameter, in England, is void: *Horner v. Graves*, 7 Bing. 735 (1831). So is a contract that the vendor will not carry on the perfume business at any place within 600 miles of London: *Price v. Green*, 16 M. & W. 346 (1847); s. c. 13 M. & W. 695; or that he will not engage in manufacturing or trading in palm-leaf beds or mattresses, in all the territory of the state of New York, west of Albany: *Lawrence v. Kidder*, 10 Barb. 641 (1851).

(5.) *Same Commerce upon the High Seas.*—If these contracts restrain, or tend to restrain, unreasonably, commerce upon the high seas, they are equally void for the same reasons that declare them invalid on land. For the benefit of all nations that strive for commercial supremacy, this enterprise should be free from restrictions. Therefore, if one ocean steamship company agrees with another to abstain from running ships between North and South America, the contract is invalid: *Murray v. Vanderbilt*, 39 Barb. 140 (1863).

(6.) *Same. Confined to Locality, but subject to Covenantor's selection.*—In *Thomas v. Miles's Administrator*, 3 Ohio St. 274 (1854), one party covenanted not to carry on a certain business at any place where the other party might carry on the same business. This case decided that where the restraint is confined to localities, if they are not definitely ascertained, and their location is subject to the vendee's selection, the contract is void because of its too general operation.

(7.) *Time.*—A limitation as to time is never a necessary element in determining the validity of these contracts. If the restraint is unreasonable as to space, the contract is void, however limited as to time. There are good reasons for this. The public is injured during the continuance of the restriction. Between a perpetual and limited restraint the only difference is the degree of mischief. It is well to remember that if the public is injured in the least, this is sufficient to nullify the agreement. On principle, the degree of injury, as affecting the validity or invalidity, ought never be considered. Thus, a contract of an innkeeper, upon selling his inn, to abstain from business for ten years (*Mossop v. Mason*, 18 Grant Ch. R. (Ont.) 453 (1871)), or a coal merchant, not to follow his business for twenty years (*Ward v. Byrne*, 5 M. & W. 548, 562 (1839); 3 Jur. 1175), or a manufacturer not to manufacture certain kinds of articles for a period of thirty years, have been condemned (*The Saratoga Co. Bank v. Bank*, 44 N. Y. 87 (1870)). See, also, *Bowser v. Bliss*, 7 Blackford (Ind.) 344; s. c. 43 Am. Dec. 93, with note, which holds that if the duration is indefinite as to time, this will not invalidate the contract.

8. *Restraints removable at the Option of the Party bound.*—It has been questioned whether agreements should be declared void which reserve to the party bound the power to remove the restraint upon paying a bonus to the other party, and it was decided that they were equally void: *Keeler v. Taylor*, 53 Penn. St. 467. No one has a right to consent to the payment of tribute for the purpose of exercising a calling. Every man holds his freedom in trust for the public. Society is entitled to the fruits of his toil. In referring to the restraint in the above case, the court said: "Is it reasonable to impose such a tribute upon the labor of a mechanic? Is not its direct tendency to restrain his skill in a useful art? And even if at law damages might be recovered for breach of such a contract, ought a court of equity to enforce it? According to the

doctrine of the cases, these questions will admit of no answers favorable to the plaintiff. He was not the patentee of scales, selling his right to another; nothing of that sort appears in the case. It was a sale merely of his handicraft, and whilst the parties were free to fix their own value of that, a contract that restrained the industry of the defendant, not in a particular locality, but everywhere, * * * was contrary to public policy."

(d) *Exceptions to the Rule.*

I. *Classification of Exceptions.*—As has been stated, there are exceptions to the general principle that all contracts in general restraint of trade are void. These exceptions may be classified as follows:

1. Where the vendee requires the protection secured by the restraint; or
2. Where the contract is made to put an end to ruinous competition; or
3. Where the advantages secured by the contract are mutual; or
4. Where the contract is given to protect a patented invention, trade-mark, or secret process of manufacture; or
5. Where the business restrained is contrary to the policy of the law where made. These will be considered in the order enumerated:

II. *Exceptions considered.*

(1.) *Where the Vendee requires the protection secured by the restraint.*

(a) *Scope of Principle.*—This exception, like the general rule, cannot be applied to all classes of cases without limitation. Its application is only extended so far as to afford a fair protection to the vendee, yet not so far as to conflict with the public weal. Private interests must succumb to the public welfare. But if the promisee's business requires the restraint, and to protect him in it would not deprive the public of any advantage, the contract will be enforced. For to enforce a contract which deprives the public of any advantage, although the interests of the promisee requires it, would be to give protection to a private citizen at the expense of the public, and deny society the power of self-protection. If we keep in mind the reasons of the principles, which have been heretofore stated, the scope of this exception will be more readily understood.

(b) *Cases where applied.*—The interests of the promisee may be

considered in two classes of cases, namely: 1. Where the restraint is strictly for the protection of the promisee, with reference to the extent of the business, and 2. Where it secures to the promisee the exclusive custom of the promisor.

(1) In the first class of cases there is apparent conflict in the decisions. In England some cases have made the protection of the promisee the controlling element in determining the validity of the restraint. In *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351; (s. c. 19 Am. Law Reg. 728, note by Judge BENNETT,) a traveller for a wine merchant, in making his contract of employment, agreed not to carry on the wine business for two years after leaving the merchant's employment. The promisee's business extended throughout England and Scotland, and like business done anywhere in the kingdom would interfere with his trade. It was contended that a restraint which extended throughout an entire country could not be upheld, even if the business of the promisee did require the protection, for that would compel the party thus bound to abandon his regular calling, or expatriate himself in order to follow it. The court, in sustaining the contract on the ground that the interest of the promisee required it, repudiated this contention, and declared that the operation of such a limitation would be unjust; that it would afford complete protection to a business local in its nature, while it would deny protection to a business extending throughout a kingdom. Then, according to the doctrine of this case, it follows as of course, that the restraint is reasonable, if the promisee's business requires it, however injurious the consequences to the public. Rather than adopt a rule which might operate unequally, the court preferred to ignore the public policy which is the foundation of the whole doctrine, and declare that in such cases the restraint may legally be co-extensive with the business.

Other English cases have likewise extended this exception. And an agreement of a solicitor to relinquish the practice of his profession in London, or within 150 miles thereof, (*Bunn v. Guy*, 4 East 190); or even if the restraint extends throughout the entire kingdom (*Whittaker v. Howe*, 3 Beav. 383), was sustained for the reason that the promisee required the protection.

In this country this principle has never been extended so far. Yet contracts have been declared valid that required the vendor to remove from a state in order to pursue his accustomed avocation in deference to this principle of protection: *Beal v. Chase*, 31 Mich.

490; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 67; but, as heretofore observed, upon this question there is some conflict: *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641. When Judge BRADLEY, of the United States Supreme Court, declared that when by such restraints "the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it," he gave the true limitation of the exception. "A contract," continues he, "that is open to such grave objections is clearly against public policy." But if it only affords "a reasonable ground of benefit to the other party, it is free from objection and may be enforced." 20 Wall. 67. Thus, upon the sale of a steamship, a stipulation of the purchaser that he would not employ the ship for ten years in the waters of California, where it appeared that such a stipulation was for the benefit of the other party, and also that such was the inducement of the sale, was held binding. *Id.* Compare this with *Wright v. Ryder*, 36 Cal. 342, where a similar agreement was held void. And a bond given by a printer or publisher, whose business extended throughout the state of Michigan, upon the sale thereof, never to engage again in such business within the state, was sustained. *Beal v. Chase*, 31 Mich. 490; see *Ainsworth v. Bentley*, 14 Weekly Rep. 630; *Ingram v. Stiff*, 5 Jur. (N. S.) 947; *Jones v. Lees*, 1 Hurl. & Norm. 189; *Allsop v. Wheatcroft*, L. R., 15 Eq. 59, 64.

Where the restraint only secures to the promisee the exclusive custom of the promisor, it will be held valid. Thus a contract not to buy meat of any one but the promisee for six months is valid. *Lightner v. Menzel*, 35 Cal. 452 (1868); so is an agreement of a publican to purchase all beer of his creditors: *Thornton v. Sherratt*, 8 Taunt. 529 (1818); see *Holcombe v. Hawson*, 2 Camp. 391 (1800); or an agreement to furnish one party with sewing-machines upon credit and at a discount, provided the other party will deal with him exclusively: *Brown v. Rounsavell*, 78 Ill. 589 (1875); see *Fisken v. Rutherford*, 8 Gr. Ch. (Ont.) 9 (1860); or to deal with a certain grocer exclusively, *Lenz v. Brown*, 41 Wis. 172 (1876); see *Holtz v. Schmidt*, 59 N. Y. 253; *Weaver v. Sessions*, 1 Marshall 505 (1815); s. c. 6 Taunt. 154; *Gale v. Reed*, 8 East 80 (1806); or to employ no person but A. to make cordage for C. & D.: *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641; or an agreement of one railroad company with another to employ no cars but the latter company's in the transportation of locomotive engines and tenders

over the former company's road : *Erie Railroad Co. v. Union Locomotive & Express Co.*, 35 N. J. L. 240 (1871).

2. *Restraints to put an end to Ruinous Competition.*—Contracts which have for their object the prevention of ruinous competition have been sustained on the ground of the benefit the public derives from them, as well as the parties thereto, in the advancement of the particular trade or industry they seek to protect. There is much danger to be apprehended in extending this principle too far ; but, when properly applied, private capital is thereby saved from disastrous rivalry, and enabled to add to the wealth of the community, thus exerting a wholesome influence upon the industrial or business interests of the state. The propriety of sustaining such contracts is seriously questioned by those who believe implicitly in the maxim, that "competition is the life of trade." It is to be observed that here the same limitation, as heretofore stated, in referring to the interest of the promisee, namely the agreement must not injure the public—holds good. The essential question is one of monopoly and injury to the public. On this ground, an agreement among the stevedores of a certain port to divide the stevedoring business, and share profits and losses arising therefrom, was sustained in England. *Collins v. Locke*, L. R., 4 App. Cas. 674 ; 28 W. R. 189 ; Whart. on Cont. §§ 442, 442a and notes. The court of the same country, also, declared valid an agreement between two railroad companies, based upon the exchange and division of traffic, for the same reasons. *Hare v. Railroad Co.*, 2 Johns. & H. 80 ; 30 L. J. Ch. 817 ; see, also, *Shrewsbury Railroad Co. v. London, &c., Railroad*, 20 L. J. Ch. 90, 102. But no contract of the latter kind has ever been sustained by the courts of this country. In another English case three rival trunk and box-makers entered into an agreement by which they divided England into three districts, each taking one, and each engaging not to interfere with the trade of the others. It appearing that this was done to prevent loss and inconvenience resulting from all doing business in the same territory, the contract was held valid. *Wickens v. Evans*, 3 Y. & J. 318 (1829). And similar contracts have been upheld in this country, where good reasons appeared for making them, and their operation was limited,—and where they did not cause a monopoly of the business they endeavored to advance. *Skrarink v. Scharringhausen*, 8 Mo. App. 522 ; *Perkins v. Lyman*, 9 Mass. 522 (1813). On the other hand, like

agreements, whose avowed purpose was to stimulate and encourage trade, but whose tendency might injure the public, have been held void. *Morris Run Coal Co. v. Coal Co.*, 68 Pa. St. 173; *Arnot v. Coal Co.*, 68 N. Y. 558; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *India Asso. v. Kock*, 14 La. Ann. 168.

3. *Where the Benefits secured by the Contract are mutual.*—The policy of the law is to encourage and protect individual enterprises. Therefore, contracts which secure mutual advantage to the parties are always held valid, unless clearly detrimental to the well being of society. These may be ranged under the following heads:

(a) *Agreements of Joint Inventors.*—An agreement between two joint inventors of a certain machine that one should sell them exclusively in two states and the other in the rest of the United States, is valid because of the reciprocal advantage given to the parties: *Stearns v. Barrett*, 1 Pick. 443 (1823).

(b) *Agreements to secure Benefits of an Invention.*—If, for the purpose of securing the benefit of an invention, a contract is made to put no machines upon the market without it, it will be sustained: *Jones v. Lees*, 1 H. & N. 189 (1856); 2 Jur. N. S. 645; N. L. J. Exch. 9; *Billings v. Ames*, 32 Mo. 265 (1862).

(c) *Agreements to Labor exclusively for a particular Person.*—In this class of cases no agreement will be sustained whose effect is to withdraw permanently and absolutely from the market any specific quota of labor by which the market would be improved: See note of Dr. Francis Wharton to *Sharp v. Whiteside*, 19 Fed. Rep., p. 166. But a contract to sell lime exclusively to a certain person for six months is valid: *Schwan v. Holmes*, 49 Cal. 665 (1875); or mint oil for two years: *Van Marter v. Babcock*, 23 Barb. 633 (1857); or all ore that the promisee may need: *Long v. Towl*, 42 Mo. 545 (1868); or to labor for no other person than the promisee for seven years: *Pilkington v. Scott*, 15 M. & W. 657; or for life: *Wallis v. Day*, 2 M. & W. 273 (1837); 1 Jur. 73. On the same principle, contracts of authors to write exclusively for particular publishers will be enforced: *Morris v. Coleman*, 18 Vesey 437 (1811); *Stiff v. Cassell*, 2 Jur. (N. S.) 348 (1856). Likewise engagements of actors and opera singers to give their services for a specified season: *McCaull v. Braham*, 16 Fed. Rep. 37 N. C. Cir. Ct. N.Y. (1883). To same effect, see *Howard v. Hopkyns*, 2 Atk. 371; *Fox v. Scard*, 33 Beav. 321; *Jones v. Seaman*, 4 Ch. Div. 636; *Barnes v. McAllister*, 18 How. Pr. 534; *Nessle v. Reese*,

29 Id. 382; *Warren v. Jackson*, 46 Id. 389. In some cases contracts for the abandonment of a business, in consideration of being furnished with employment for life, will be sustained: *Wallis v. Day*, 2 M. & W. 273 (1837); 1 Jur. 73; 15 Vin. Abr. 323. See *Hartley v. Cummings*, 5 C. B. 246 (1847); s. c. 2 C. & K. 433; s. c. 12 Jur. 57; 17 L. J. C. P. 84; *Pilkington v. Scott*, 15 M. & W. 657; or, in consideration of becoming part owner of a patent, to conduct exclusively the business of manufacturing and dealing in machines of that patent: *Kinsman v. Parkhurst*, 18 How. (U. S.) 289 (1855).

4. *Contracts to protect Patented Inventions, Trade-Marks and Secret Processes of Manufacture.*—The law looks with favor upon contracts which have for their object the protection and encouragement of patents, trade-marks and secret processes of manufacture. Therefore, in the sale of these articles, covenants of the vendor not to enter into competition with the vendee are valid: *Patents.*—*Morse & Twist Drill, &c., Co., v. Morse*, 103 Mass. 73 (1869); sale of patent pen, *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Sup. Ct. (16 J. & S.) 442, 447 (1882). *Sale of Secrets.*—*Hagg v. Darley*, 47 L. J., N. S. Ch. Div. 567 (1878); s. c. 38 L. T., N. S. 312; *Bryson v. Whitehead*, 1 Sim & Stu. 74 (1821); s. c. 1 L. J. Ch. 42; *Morison v. Moat*, 9 Hare 241 (1851); *Green v. Tolgham*, 1 S. & S. 389; *Williams v. Williams*, 3 Mer. 158; *Yovatt v. Wingard*, 1 J. & W. 394; 30 L. J. Ch. 209, 213, 219; *Wyatt v. Wilson*, 1 M. & G. 46; *Albert v. Strong*, 1 Id. 25; *Tipping v. Clarke*, 2 Hare 383; 24 Eng. Ch. R. 383; *Brewer v. Lamar*, S. C. Ga. 18 Cent. L. J. 54; *Gillis v. Hall*, 2 Brewster 342; s. c. 7 Phila. (Penn.) 422; 27 Leg. Int. 1870, p. 302; *Hard v. Seeley*, 47 Barb. 428; *Leather Cloth Co. v. Lorscheint*, L. R., 9 Eq. 345 (1869); *Alcock v. Giberton*, 5 Duer (N. Y.) 76 (1855); *Peabody v. Norfolk*, 98 Mass. 452; *Vickery v. Welch*, 19 Pick. 523. "Public policy requires," as was said in one case, "that when a man has by skill or by any other means obtained something he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser:" *Leather Cloth Co. v. Lorscheint*, L. R., 9 Eq. 354, 355.

5. *Business restrained contrary to Policy of the Law.*—Contracts

in restraint of a business condemned by the policy of the law are good. The reasons of this principle are obvious. The policy of the law is only to promote and encourage those trades and employments which advance the public welfare. Therefore, any pursuit which the laws of a country or state seek to restrain, may be restricted, for it is not within the protection of the law. Thus, if the public policy of a state, as evinced by legislative enactments, is directed to suppress the liquor traffic, such business may be restrained within that state's borders: *Harrison v. Lockhart*, 25 Ind. 112 (1865). The liquor traffic is injurious to the public interests, and hence the reasons of the rule protecting other employments does not apply to this one, and, therefore, it cannot be said to be within the rule. The public sentiment of Indiana has always been against the liquor traffic. "The legislature enacted the law in question upon the assumption that the manufacture and sale of beer, &c., were necessarily destructive to the community:" *Beebe v. The State*, 6 Ind. 520. Laws were passed in the reign of Edward III., Henry III. and Henry VIII., prohibitory in their character, of the sale of liquor. In the time of Henry III. an act was passed disqualifying persons engaged in such employments from holding any office of a judicial or executive character. Early in the present century, in our country, movements were commenced among the people which, to a greater or less extent, have from time to time influenced legislation, and at present the traffic in intoxicating liquor, as a beverage, is absolutely prohibited in some of the states of the Union: 25 Ind. 114. See, also, *Dixon v. U. S.*, 1 Brock. (MS. Dec.) 177, for illustration of contract restraining business against public policy.

VII. PARTIAL RESTRAINTS.

(a) *Criterion of Validity*.—The same general principles which govern contracts in general restraint of trade, apply with equal force to contracts which contemplate a partial or limited restraint. Contracts of the latter kind are valid and binding. *Angier v. Webber*, 14 Allen (Mass.) 211; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Noble v. Bates*, 7 Cow. (N. Y.) 307; 10 Mod. 27, 85, 130; 7 Mod. 230; 2 Saund. 156 A. N. (1); 2 Str. 739; 2 Ld. Raym. 1456; 3 Bro. P. C. 349; Br. Ch. 418; 5 T. R. 118; 5 Cow. 144 and 150 N.; 3 Johns. Cas. 297; 7 Johns. 72; 13 Wend. 590; 17 Wend. 454; 21 Id. 162; 10 Paige 123; 10 N. Y. 244; 68

N. Y. 304; 8 Barb. 45; 11 Id. 134; 12 Id. 381; 4 How. Pr. 408; 9 Id. 338; 13 Id. 238; 34 Id. 205; 51 Id. 378; 1 E. D. Smith 581. No rule as to the exact extent of territory covered by these restraints can be given: the restraint will be considered limited and valid if it is not unreasonable. *Pyke v. Thomas*, 4 Bibb (Ky.) 486; 7 Am. Decisions 741, and note; *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351; s. c. 19 Am. Law Reg. 748, and note. The point of difficulty, in these cases, is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. "And it is obvious at first glance," remarked BRADLEY, J., (*Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 68, 69), "where it is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be therefore void." *Hitchcock v. Coker*, 6 Ad. & El. 454, "that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation; *provided it does not violate the two indispensable conditions that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.*"

(b) *Rule stated.*—The principle, as deduced from the authorities, so far as concerns space, is that the validity depends upon the reasonableness of the contract, and there is no other rule limiting the area over which the contract may legally extend. The contract must be considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made; and if the restraint contracted for appears to have been for a just and honest purpose—for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as to them, and not specially injurious to the public—the restraint will be valid.

Hubbard v. Miller, 27 Mich. 15 (1873), per CHRISTIANCY, J.; see *Leggott v. Barrett*, 43 L. T. Reports (N. S.) 641. In *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351, it was stated that if the extent of the restraint upon one party is not greater than protection to the other party requires, the contract is reasonable and valid. It is obvious that the principle is too broadly stated. If the protection of the promisee required the other party to give up his calling, and deprived the public of the benefit of his exertions, the contract is clearly against public policy. The principle thus extended would certainly be harmful to the public, and ought never be applied without limitation.

(c) *Reasonableness of the Restraint a Question of Law*.—Whether the restraint is reasonable with reference to territory is a question of law, to be decided in view of the circumstances of each particular case. *Gilman v. Dwight*, 13 Gray 356; *Taylor v. Blanchard*, 13 Allen 370; *Treat v. Melodeon*, 35 Conn. 543; *Guarand v. Dan-delet*, 32 Md. 561; *Grasselli v. Lowden*, 11 Ohio St. 349; *McAlister v. Howell*, 42 Ind. 15; *Linn v. Sigsbee*, 67 Ill. 75; *Hedge v. Lowe*, 47 Iowa 137; *Chappel v. Brockway*, 21 Wend. 157; *Jones v. Heavens*, L. R., 4 Ch. Div. 636.

(d) *Application of the Rule*.—If the business sold is extensive, a greater restraint will be permitted than in case of a business necessarily local or limited in its nature. An agreement not to practise law in London, or within 150 miles thereof, is valid. *Bunn v. Guy*, 4 East 190; so is an agreement of a publisher, covering the same space. *Tallis v. Tallis*, 1 El. & Bl. 391; 17 Jur. 1149; 22 L. J. Q. B. 185. An agreement of a milliner, upon sale of her business, to abstain from conducting the same business within such distance as might interfere with the business sold, is valid. *Morgan v. Perhamus*, 36 Ohio St. 519; s. c. 38 Am. Rep. 607. And a covenant of a miller not to engage in the milling business within 30 miles of a certain place is reasonable; *Bowser v. Bliss*, 7 Black (Ind.) 344; s. c. 43 Am. Dec. 93, with note; so is a contract of a physician not to practise medicine within 20 miles of a given place: *Butler v. Burleson*, 16 Vt. 176; see also *Hayward v. Young*, 2 Chitty 407; *Gravely v. Barnard*, L. R., 18 Eq. 518; 43 L. J. Ch. 659; 30 L. T. (N. S.) 863; covering a distance of 10 miles: *Cook v. Johnson*, 47 Conn. 175; *Bets's Appeal*, 10 W. N. C. 431; or 12 miles: *McClurg's Appeal*, 58 Pa. St. 51; or 15 miles: *Miller v. Elliott*, 1 Ind. 484, is also reasonable; or an apothecary not to conduct an apothecary

shop within 20 miles of the old stand: *Hayward v. Young*, 2 Chitty 407; see also *Sainter v. Ferguson*, 7 C. B. 716; s. c. 13 Jur. 828, where an agreement not to act as an apothecary within 7 miles of a certain town was held valid; or a lawyer not to practise law within 21 miles of a certain place: *Dendy v. Henderson*, 11 Exch. (H. & G.) 194; 24 L. J. Exch. 326; see *Linn v. Sigsbee*, 67 Ill. 75; or a merchant to abstain from the mercantile business within 10 miles of the business sold, *Gompers v. Rochester*, 56 Penn. St. 194; see *Haldeman v. Simonton*, 55 Iowa 144 (1880). It is reasonable for a butcher to agree not to engage in his business within a distance of 5 miles: *Elves v. Crofts*, 10 C. B. 239; or a gas-fitter not to engage in his business for a distance of 20 miles: *Hitchcock v. Coker*, 6 Ad. & El. 438; or not to conduct the business of manufacturing soap within 40 miles of a place: *Ross v. Sadgbeer*, 21 Wend. 166; or not to carry on a saddlery and harness shop within 20 miles of a place: *Nobles v. Bates*, 7 Cow. 307; or within 10 miles of a place: *Jones v. Heavens*, L. R., 4 Ch. Div. 636; see, also, *Harrison v. Lockhart*, 25 Ind. 112; *Curtiss v. Gokey*, 68 N. Y. 300; 8 Scott N. R. 674; 7 M. & G. 969; 8 Jur. 105; 14 L. J. C. P. 10; *Taylor v. Clark*, 2 Show. 350; *Jollie v. Broad*, 2 Roll. Rep. 201; s. c. Noy 98; *Prugnell v. Gosse*, Allyn 67; *Noah v. Webb*, 1 Edw. Ch. (N. Y.) 604; *Dan-kin v. Williams*, 11 Wend. 67; *Middleton v. Brown*, 47 L. J. N. S. Ch. Div. 411; *Benwell v. Inns*, 24 Beav. 307; s. c. 26 L. J. Ch. 663; *Shackle v. Baker*, 14 Ves. 468.

On the same principles, agreements not to follow a business in a county, *Lange v. Werk*, 2 Ohio St. 517; see *Weller v. Hersee*, 10 Hun (N. Y.) 431; *Dean v. Emerson*, 102 Mass. 480; or in a limited territory: *Richardson v. Peacock*, 33 N. J. Eq. 597 (1881); *Avery v. Langford*, 1 Kay 663 (1854); or a large portion thereof, *Id.*; or over a certain limited route over which the vendor was in the habit of conducting his business, are reasonable and valid: *Angier v. Webber*, 14 Allen 211 (1867); *Dunlop v. Gregory*, 10 N. Y. 241 (1851); *Chappel v. Brockway*, 21 Wend. 159 (1839); *Archer v. Marsh*, 6 Ad. & El. 959 (1837); *Leighton v. Wales*, 3 M. & W. 545 (1838); *Davis v. Barney*, 2 Gill & J. (Md.) 382 (1830); *Pierce v. Fuller*, 8 Mass. 223 (1811); *Westfall v. Mapes*, 3 Grant Cas. (Pa.) 198 (1855); *Homer v. Ashford*, 3 Bing. 322 (1825); *Boutelle v. Smith*, 116 Mass. 111 (1874); *Ewing v. Johnson*, 34 How. Pr. (N. Y.) 202 (1864); *Mumford v. Gething*, 6

Jur. (N. S.) 428 ; s. c. 29 L. J. C. P. 105 ; 8 W. R. 187 ; 1 L. T. N. S. 64 ; 7 C. B. N. S. 305. So agreements to relinquish the practice of a profession within the limits of a town : *Doty v. Martin*, 32 Mich. 462 (1875) ; *Dwight v. Hamilton*, 113 Mass. 175 (1873) ; *Mott v. Mott*, 11 Barb. 127 (1851) ; *Niver v. Rossman*, 18 Barb. 50 (1853) ; *Haldeman v. Simonton*, 55 Iowa 144 (1880) ; *Gilman v. Dwight*, 13 Gray (Mass.) 356 (1859) ; *Cook v. Johnson*, 47 Conn. 175 (1879) ; *Smalley v. Green*, 52 Iowa 241 (1879) ; *Zimmerman v. Devin*, 17 W. Rep. 230 ; s. c. 23 Am. L. Reg. 50 (1883), note ; or city, *Mallan v. May*, 11 M. & W. 652 (1843) ; or to abstain from a business in a town, *Grundy v. Edwards*, 7 J. J. Marsh. (Ky.) 368 ; s. c. 23 Am. Dec. 409 ; *Pike v. Thomas*, 7 Am. Dec. 741 ; *Heichew v. Hamilton*, 3 G. Green (Iowa) 596 (1852) ; *Gompers v. Rochester*, 56 Pa. St. 194 (1869) ; *Hoagland v. Segur*, 38 N. J. L. 230 (1876) ; *Whitfield v. Levy*, 35 N. J. L. 149 (1871) ; *Roller Co. v. Ott*, 14 Kan. 609 (1875) ; *Clark v. Crosby*, 37 Vt. 188 (1864) ; or city, *Green v. Price*, 13 M. & W. 695 (1845) ; s. c. *Price v. Green*, 16 M. & W. 346 (1847) ; *Wintz v. Voyt*, 3 La. Ann. 16 (1848) ; *Viegas v. Forsbee*, 9 Id. 249 ; *Muller v. Vettel*, 25 How. Pr. (N. Y.) 350 (1864) ; *Colmer v. Clarke*, Cas. temp. Hardwicke 135 ; *Beard v. Dennis*, 6 Ind. 200 (1855) ; *Goodman v. Henderson*, 58 Ga. 567 (1877) ; *Thomas v. Adair*, 3 Ohio St. 274 (1854) ; *Stewart v. Challacombe*, 11 Bradwell App. (Ills.) 379 (1882) ; *Dakin v. Williams*, 11 Wend. (N. Y.) 67 (1833) ; *Pierce v. Woodward*, 6 Pick. 206 (1828), have been enforced. This principle is applicable to all kinds of occupations and professions : *Smalley v. Green*, 52 Iowa 241 ; *Whittaker v. Howe*, 3 Beav. 383, 393, per Ld. LANGDALE ; and the contract is valid whether made by parol or bond, *Thompson v. Means*, 11 Sm. & Mar. (Miss.) 604 ; *Pierce v. Fuller*, 8 Mass. 223 ; *Mitchel v. Reynolds*, 1 P. Wms. 181 ; *Alger v. Thacher*, 19 Pick. 51 ; or with an alien : *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351. The restraint may operate upon a third person : *Presbury v. Fisher*, 18 Mo. 50 ; *Gilman v. Dwight*, 13 Gray (Mass.) 356, or it may begin in the future : *Butler v. Burleson*, 16 Vt. 176 (1876) ; *Grasselli v. Lowden*, 11 Ohio St. 349, and the damages for a violation may be liquidated : *Miller v. Elliott*, 1 Ind. 484 ; *Duffy v. Shockey*, 11 Ind. 71 ; *Hoagland v. Segur*, 38 N. J. L. 230 ; and, like general restraints, indefiniteness as to time does not affect their validity. *Jacoby v. Whitmore*, 49 L. T. (N. S.) 335 ; *Cook v. John-*

son, 47 Conn. 175; *Hastings v. Whitley*, 2 Exch. 611; *Bowser v. Bliss*, 7 Blackf. 344; *Ward v. Byrne*, 5 M. & W. 548; *Allsopp v. Wheatcroft*, L. R., 15 Eq. 59; *Catt v. Tourle*, L. R., 4 Ch. App. 659; *Perkin v. Clay*, 54 N. H. 518.

(e) *Presumptions*.—The law presumes all contracts in restraint of trade bad, if nothing more appears: *Mitchel v. Reynolds*, 1 P. Wms. 181; *Mallon v. May*, 11 M. & W. 653; *Chappel v. Brockway*, 21 Wend. 157; *Hoffman v. Brooks*, 11 W. L. Bull. (O.) 258; *Bozer v. Bliss*, 7 Blackf. (Ind.) 344; *Horner v. Graves*, 7 Bing. 735; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123; s. c. 3 Chandler (Wis.) 133; *Elves v. Crofts*, 10 C. B. 247; *W. Va. Tel. Co. v. Ohio R. P. L. Co.*, 22 W. Va. 600; *Pierce v. Fuller*, 8 Mass. 223. But see *Hubbard v. Miller*, 27 Mich. 15, per CHRISTIANCY, J., and whether this presumption is overcome is a question of law: *Tallis v. Tallis*, 1 El. & Bl. 391; *Kellogg v. Larkin*, 3 Pinney 123; *Bowson v. Bliss*, 7 Blackf. (Ind.) 344; *Lum v. Sigsbee*, 67 Ill. 81. If the petition does not show facts sufficient to overcome this presumption, it is bad. *Metzger v. Cleveland*, 3 Indiana Law Magazine, 42, 44; *Lange v. Werk*, 2 Ohio St. 519, 528.

(f) *Consideration*.—The petition, to be good, must not only show that the restraint is partial, but it must also show that the contract is founded upon a valuable consideration, and that it is reasonable and not oppressive. *Thomas v. Mills*, 3 Ohio St. 275; *Brewer v. Marshall*, 4 Green Ch. 537; *Wright v. Ryder*, 36 Cal. 357; *Holbrook v. Waters*, 9 How. Pr. 335; *Dunlop v. Gregory*, 10 N. Y. 241; *Chappel v. Brockway*, 21 Wend. 157; *Holmes v. Martin*, 10 Ga. 503; 2 Pars. on Cont. 753; *Mitchell v. Reynolds*, 1 Smith's Lead. Cas. 724, with instructive note; *Lange v. Werk*, 2 Ohio St. 528. Some cases have laid down the rule that the consideration must be adequate: *Homer v. Graves*, 7 Bing. 735; *Young v. Timmins*, Tyr. 226; *Long v. Towl*, 42 Mo. 545; *Mitchel v. Reynolds*, 1 P. Wms. 181; but the weight of authority is against this rule: *Collins v. Locke*, L. R., 4 App. Cas. 674; *Hitchcock v. Coker*, 6 Ad. & E. 439; *Duffey v. Shockey*, 11 Ind. 70; *Grasselli v. Loudon*, 11 Ohio St. 349; *Archer v. Marsh*, 6 A. & E. 959; *Gravelly v. Barnard*, L. R., 18 Eq. 518; *Leigeton v. Wales*, 3 M. & W. 545; *Ward v. Byrne*, 5 Id. 548; *Pilkington v. Scott*, 15 Id. 657; *McChurg's Appeal*, 58 Pa. St. 51; *Price v. Green*, 16 M. & W. 346; *Lawrence v. Kidder*, 10 Barb. 641; *Middleton v. Brown*, Eng. Ct. App., 47 L. J. N. S., Ch. Div. 411; *Hubbard v. Miller*, 27

Mich. 15 ; and whether the consideration is adequate or not, is a question which the court will not examine. If the contract shows on its face a legal consideration, it is sufficient ; but whether adequate or inadequate to the restraint imposed, must be determined by the parties themselves, upon their own view of the circumstances attending the particular transaction ; whereas, if it were otherwise, it would be the court and not the parties making the contract : *Guerand v. Dandeleit*, 32 Md. 561. It has been stated that the reasonableness of the consideration is a question of law, evidence not being admissible outside of the contract, therefore the cause of the consideration must be disclosed. 2 Addison on Cont. 741, bottom paging and note (g).

EUGENE McQUILLAN.

St. Louis, Mo.

RECENT ENGLISH DECISIONS.

Court of Appeal.

JOSEPH v. LYONS.

A registered bill of sale of personal property which includes stock in trade to be afterwards acquired is, as to such stock in trade, only a contract to assign and the vendee takes only an equitable title. Such vendee cannot maintain trover for the property against a *bona fide* pledgee, who received such goods from the vendor in the ordinary course of business.

In the absence of anything to lead the pledgee to believe a bill of sale existed, he is not chargeable with constructive notice by reason of his failure to inquire if there was such a registered bill of sale.

APPEAL of the defendant from the judgment of HUDDLESTON, B., at trial, in an action to recover 171*l.* for the detainee and conversion of certain jewelry which the plaintiff claimed under a bill of sale.

By a duly registered bill of sale, dated February 3d 1881, F. Manning, by way of security for certain money due from him to the plaintiff, assigned to the plaintiff the goodwill and interest of him, the said F. Manning, in the business of a gold and silversmith, carried on by him at a certain shop in Worcester, and also all the stock-in-trade in or about or belonging to the premises, and also all the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises or be appropriated to the use thereof, either in addition to, or in substitution